United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2030

B
P/S

ARGUED BY:

APPEAL NO. 74-2030 ROBERT RIVERS

UNITED STATES COURT OF APPEAL
SECOND CIRCUIT: NEW YORK

IN THE MATTER OF THE APPLICATION OF:
WILLIAM JONES, CLARENCE BRRIS, MARY HOBBS, ROBERT CURRY, MRS. EVELYN BROWN, THOMAS HOLMES, MRS. EPPIE JOHNSON, WILLIAM HARRIS, MRS. ALBERTHA JOHNSON, MRS. ROSE WILLIS, MRS. SHARA BROWN, WILLIAM DORY, MRS. ELLA HARRIS, GEORGE ROSTKY and GREAT NECK MANOR CIVIC ASSOCIATION, and all other similarly situated,

Petitioners,

-against-

ROBERT C. MEADE, JAMES R. WELLS, MICHAEL J. TULLY, JR., GEORGE C. SOOS, FELIX G. ANDREWS, JOHN F. McDONALD, ARTHUR G. BINGHAM, WILLIAM H. RYAN, JR., TOWN OF NORTH HEMPSTEAD,

First Respondents,

HECTOR H. GAYLE, Executive Director, BERNARD GARTLER, Chairman, JOSEPH CECI, DR. CURTIS KENDRICK, LOCAL URBAN RENEWAL PLANNERS,

Second Respondents,

JOHN MAYLOTT and GERALD V. CRUISE, DEPT. OF HOUSING AND URBAN DEVELOPMENT,

Third Respondents,

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

(1) Whether federal funds could be used to perpetuate racial segregation contrary to Section 601 of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d and Section 808 of the Civil Rights Act of 1968, 42 U.S.C. Section 3608 and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

(2) Whether HUD's investigatory report in which appellants were given only half an hour to explain their position and the limited review by the Court accorded appellants' due process of law.

(3) Whether the Town Board's determination that the Spinney Hill area is a blighted and unsanitary area can be accepted as a conclusion of fact when there was no evidence to substantiate that contention.

STATEMENT OF THE CASE

This is an appeal by the petitioners-appellants (hereinafter referred to as appellants) from the judgment of the United States District Court for the Eastern District of New York presided over by the HON. JUSTICE J. R. BARTELS, rendered on June 27, 1974, summarily dismissing appellants' complaint.

This action was instituted by the appellants on July 24, 1973. Appellants, several individuals who reside in the SPINNEY HILL area and the GREAT NECK MANOR CIVIC ASSOCIATION commenced this class action against the TOWN OF NORTH HEMPSTEAD (hereinafter referred to as first respondents), the local URBAN RENEWAL AGENCY (hereinafter referred to as second respondents) and the DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT (hereinafter referred to as third respondents) to enjoin the construction of a proposed one hundred unit low and moderate income housing project on a site selected by the second respondents in SPINNEY HILL, a predominantly Black area within the Town of North Hempstead, Nassau County, State of New York. It was the contention of the appellants

that the construction of the project well perpetuate racial segregation in the SPINNEY HILL area in violation of Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, and Section 808 of the Civil Rights Act of 1968, U.S.C. Section 3608.

Appellants made it abundantly clear that they are not basically against the construction of public housing, but that they cannot remain passive when the respondents are exploiting the need for public housing to colonize Black people in view of the fact that all the three (3) public housing in the TOWN OF NORTH HEMPSTEAD are constructed in a predominantly Black neighborhood. It was, however, the conclusion of the appellants that, irrespective of the acute need for housing, to construct the fourth public housing in the Town in a predominantly Black neighborhood is obviously an attempt by the respondents to frustrate the contents of the Civil Rights Act and to perpetuate racial segregation.

The series of events which led to this appeal are as follows:

On the 10th day of May, 1972, the second respondents called a public meeting to explain to the public a proposal to construct a housing project in the SPINNEY HILL neighborhood. However, in their proposal, the second respondents deliberately selected one site in a predominantly Black neighborhood in the Town of North Hempstead which already had three (3) public housing situated in predominantly Black neighborhood, knowing that a survey previously taken by the Town indicated that 90% of the tenants applying for the new housing are Black, while other suitable locations for the construction of such housing are available in a predominantly white neighborhood.

At the said meeting, appellants made it perfectly clear that the construction of the project would be in violation of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. Notwithstanding the discriminatory aspect of the proposed construction of the project, the third respondents approved the proposal.

On the 24th day of July, 1973, the appellants filed

a complaint in an effort to assert their constitutional right. After a series of Hearing before HON. JUSTICE BARTELS, appellants' complaint was summarily dismissed on the 27th day of June, 1974, without a trial to determine if the constitutional rights of the appellants have been violated as alleged in their complaint. It is the contention of the appellants that the Trial Justice erred in dismissing their complaint summarily. It is further the contention of the appellants that, assuming without conceding that the approval of HUD of the project complies with HUD's regulation; that, however, does not relieve the respondents of their breach of the appellants' constitutional right under the equal protection clause of the Constitution and the Civil Rights Acts.

ARGUMENT

POINT ONE

FEDERAL FUNDS COULD NOT BE USED TO PERPETUATE RACIAL SEGREGATION CONTRARY TO SECTION 601 OF THE CIVIL RIGHTS ACT OF 1964, 42 U.S.C. SECTION 2000d AND SECTION 808 OF THE CIVIL RIGHTS ACT of 1968 42 U.S.C. SECTION 3608 AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

The prohibition of racial segregation in public housing has been the policy of various legislation and it is embedded in the Constitution of the United States. The Housing and Urban Development Act of 1968 explicitly reaffirmed the policy enunciated by Congress in 1949 of providing a decent home for every American family. The achievement of this ultimate objective has, however, been marred by the effort of the various government agencies charged with the responsibility to administer fair public housing in using the urgent need for housing, especially among Black people, to perpetuate racial segregation.

In recent years, courts have carefully scrutinized low income public housing programs to determine whether their administration violates HUD's regulations, (see SHANNON v. HUD, 436 F 2d 809 (3rd cir 1970)), the CIVIL RIGHTS ACTS (see BLACKSHEAR RESIDENTS ORGANIZATION v.

HOUSING AUTHORITY, 347 F SUPP 1138), or the EQUAL PROTECTION GUARANTEES OF THE CONSTITUTION. (See GAUTREAUX v. CHICAGO HOUSING AUTHORITY, 296 F SUPP 907.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 2000d (1970) prohibits discrimination on the basis of race, color, or national origin in the administration of federally assisted programs. Title VIII of the Civil Rights Act of 1968, 42 U.S.C. Section 3601 - 3619, 1970, however, deals primarily with private discrimination in housing, but also requires the Secretary of HUD to administer all programs "in a manner affirmatively to further" fair housing policies. 42 U.S.C. Section 3608 (d) (5) (1970). The Equal Protection Clause of the Fourteenth Amendment applies only to the states, but the Supreme Court in BOLLING v. SHARPE, 347 U.S. 497 1954, has made it clear that the same restrictions apply to federal action through the due process clause of the Fourth Amendment.

Thus it must be pointed out that there are three (3) clear instances where racial segregation can be perpetuated in the construction of public housing. It is respectfully submitted that the Trial Justice in this in-

stant case erred in considering only whether the construction of the one hundred unit SPINNEY HILL project violates HUD's regulation. In summarily dismissing appellants' complaint, the Trial Justice denied the appellants the opportunity to prove that the construction of the SPINNEY HILL project was in violation of the equal protection clause of the Fourteenth Amendment of the United States Constitution and the Civil Rights Act.

Challenges to the administration of public housing systems as denying equal protection to tenants and in violation of Civil Rights Acts have focused on segregative practices in site selection. When the complainant demonstrates that the local Urban Renewal Agency has deliberately sought to place projects that will be occupied by racial minorities in minority areas, discrimination in violation of the constitution has been shown VLANDIS v. KLINE, 412 U.S. 441, 458, 1973.

The issue then is whether the respondents are in adequate compliance with the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment. Thus taking together and viewing from their historical context, the actions of the respondents in resisting attempts designed

to achieve the National Housing Policy of balanced and dispersed public housing and failing to assist such attempts violate the equal protection clause and the Civil Rights Act.

Under the Equal Protection Clause of the Fourteenth Amendment, racial discrimination may be established either by proof of purpose or effect. The location of the Spinney Hill project which has prospective 90% Black occupancy is in direct contravention of the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment because federal funds are being used to maintain racial segregation and the effect of concentrating Black people in one neighborhood when there is an alternate suitable neighborhood where such a project could be built. Thus in GAUTREAUX v. CHICAGO HOUSING AUTHORITY, 296 F SUPP 907 (N.D. 111, 1969) the court inferred a deliberate policy of perpetuation of residential segregation in Chicago and within the public housing system. The inference of intentional discrimination arose from a finding that more than 99% of the units occupied by Black tenants were in projects located in Black neighborhoods. Thus it

was asserted in GAUTREAUX that:

> "Plaintiff....have the right.... to have sites selected for public housing projects without regard to the racial composition of either the surrounding neighborhood or of the projects themselves."

In HICKS v. WEAVER, 302 F SUPP 619, another federal district court applied the same principles in evaluating the public housing program. A presumptive violation of the Fourteenth Amendment was established by the showing that the local authorities considered only sites in ghetto areas for a new project intended to house displaced Blacks. It was suggested by the court that the presumption could be rebutted by a showing that no acceptable sites other than those in Black neighborhoods were available, but as in the instant case, the defendant housing authority could not make that showing. Thus it was stated in HICKS:

> "Where the dominant factor in selecting sites for location of public housing was racial concentration of neighborhood and purpose was to perpetuate segregation of races in public housing and present location of sites in all Black neighborhood would most likely perpetuate

> segregation, this was rank discrimination, forbidden by equal protection clause of the Fourteenth Amendment and Civil Rights Acts of 1964 and 1968."

In a more recent case, BANKS v. PERK, 341 F. SUPP 1175 (N.D. 1972) the public housing program of Cleveland was held to have been administered in violation of the Fourteenth Amendment and the Civil Rights Acts. The plaintiff, as in this instant case, showed that most new public housing projects had been placed in minority areas of the city, and that city officials had rejected certain privately developed, subsidized low income projects in white areas of the city. The court found that there had been no satisfactory showing of an alternative explanation for the city's denial of building permits for the proposed white area projects. The court also held that good faith operation of the housing system by the Cleveland Metropolitan Housing Authority was no defense where the natural and probable effect of its actions was known to be perpetuation of residential segregation.

The holdings in these cases provide some insight into factors that, when combined with a showing of segregation

within the public housing system, will trigger a presumption of intentional racial segregation on the part of the local Urban Renewal Agency. Thus, where a housing project is found to have been constructed or maintained in a manner inconsistent with the equal protection guarantees of the Constitution and the Civil Rights Acts, the constitutional violation must be remedied. In GAUTREAUX (Supra), the court held that such a violation can be cured only by restricting the control of local authorities over the selection of sites for new projects and has ordered the construction of new projects in specified areas of the city.

It must also be noted that the legal maxim that one is presumed to have intended the foreseeable consequences of his acts is operative in this area. Thus where it is forseeable that an agency's action will result in segregation, it is appropriate that the authorities be held to have intended the segregation. BRADLEY v. MILLIKEN, 338 F SUPP 582, 592, (E.D. MICH. 1971); FISS RACIAL IMBALANCE IN PUBLIC SCHOOLS; The constitutional concepts, 78 HARV. L. REV. 564, 584-585; NORWALK CORE v.

NORWALK REDEV AGENCY, 395 F 2d 920, 931 (2d Cir. 1968.)

In the instant case, the project in question here was intended for occupancy of people of which, as indicated by the survey previously taken by the Town, Blacks formed a vast majority, consequently, the respondents considered only the site located within all Black or virtually all Black neighborhood and therefore selected only a site in Black neighborhood. Thus the project was clearly conceived to provide housing for Blacks in a Black neighborhood. It was implimented with this intent and its present posture conforms to its original design. Its purpose therefore in doing so was to maintain segregation in public housing in the area of Great Neck and Manhasset, and the fact that it is intended to provide housing for low income people does not excuse the respondents from maintaining and perpetuating racial segregation contrary to the federal guidelines.

However, there has never been any attempt by the respondents to locate the project in non-segregated site.

In such circumstances, the only conclusion the appellants could draw is that the respondents intended from the onset to construct the project in a predominantly Black neighborhood, contrary to the Civil Rights Acts and the Equal Protection Clause of the Fourteenth Amendment and the fact that they are doing it in good faith does not exculpate them. In BURTON v. WILMINGTON PARKING AUTHORITY, 365 U.S. 715, it was reiterated that; "It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith."

Some courts have responded to alternative claims under the Civil Rights Acts, and have held that beyond the constitutional duty not to use racial characteristics to the detriment of the rights of minorities within public housing system, there is a statutory duty to promote integration or to take affirmative action to avoid segregation, by considering the racial impact of project placement in minority areas. SHANNON v. HUD, 436 F 2d 809 (3rd Cir 1970;) BLACKSHEAR RESIDENTS ORGANIZATION v. HOUSING AUTH., 347 F SUPP 1138. This duty,

however, is statutory only, and is not constitutionally required. BANKS v. PERK, 341 F SUPP 1175.

In this regard, it must be pointed out that this program of the respondents will make it virtually impossible to achieve meaningful school desegregation. Indeed, as even a glimmering of objectivity will disclose, a dispersal of Urban Housing patterns is the only alternative to massive bussing if desegregation rather than resegregation is to be achieved. Furthermore, it must be observed, that all the three (3) public housing, namely; PORT WASHINGTON HOUSING PROJECT, MANHASSET HOUSING PROJECT and ROSLYN HOUSING PROJECT, in the TOWN OF NORTH HEMPSTEAD, are situated in the predominantly Black neighborhood of the Town. This is a clear indication that no attempt or effort was made to acquire non-segregated sites. In view of this, it is the considered opinion of this writer that to allow the fourth (4th) public housing in the Town to be constructed in predominantly Black neighborhood would be an attempt to defeat the Civil Rights Act and the Equal Protection Clause of the Fourteenth Amendment.

It is, however, the submission of the appellants that the Trial Judge erred in dismissing the complaint without giving the appellants an opportunity to prove their allegations on trial. It is obvious and clear from decided cases that the SPINNEY HILL project as presently constituted, represents an expenditure of federal funds for the purpose of bringing about racial segregation contrary to the enlightened concept of federally mandated scattered housing principle.

In view of the foregoing facts, it is the submission of the appellants that the intricate and constitutional issues involved in this case cannot be resolved on the basis of affidavits, but on trial where evidence could be adduced to support appellants' contention.

ARGUMENT

POINT TWO

HUD'S INVESTIGATORY REPORT IN WHICH APPELLANTS WERE GIVEN ONLY HALF AN HOUR TO EXPLAIN THEIR POSITION AND THE LIMITED REVIEW BY THE COURT DID NOT ACCORD APPELLANTS' DUE PROCESS OF LAW

The constitutional guarantee that no person shall be deprived of life, liberty or property without due process of law, which is the same under the Fourteenth Amendment to the Constitution of the United States as under Article 1 Section 6 of the New York State Constitution, applies to proceeding of administrative agencies as well as to courts. It is not confined to judicial proceedings, but extends to every case which may deprive a citizen of life, liberty or property, whether the proceedings are judicial, administrative or executive in nature.

Due process of law is a term which is not capable of precise definition and its contents may vary in a different field in which adjudicatory powers are exercised. It may be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case, in which the citizen has an opportunity to be heard and to defend, enforce and protect his rights.

It is imperative in all proceedings of a judicial nature looking to a deprivation of life, liberty or property, that the person proceeded against is entitled as a matter of right to notice and an opportunity to be heard. The due process clause of the Constitution is intended to secure to the individual from arbitrary excercise of powers of government unrestrained by established principles of private right and distributive justice; REFOULE v. ELLIS, 74 F SUPP 336. See also REIN v. JOHNSON, 1947 30 N.W. 2d 548, 149 Neb. In general, due process of law stands for protection against arbitrary exercise of the powers of government assures adherence to the fundamental principles of justice and fair play, and in proceedings of a judicial nature looking to a deprivation of life, liberty or property entitles the person proceeded against to notice and an opportunity to be heard as matter of right. STUART v. PALMER, 74 N.Y. 183.

Due process of law may be afforded administratively as well as judicially, since lawful administrative process is due process equally as much as lawful judicial process. NULTER v. STATE ROAD COMMISSION OF WEST VIRGINIA, 1937, 193 S.E. 549, 119 W. VA. 312, dissenting opinion 194 S.E.

270, 119 W. VA. 312. Due process of law, however, is not necessarily judicial process; much of the process by means of which the various administrative agencies are carried on, and the order of society maintained, is purely administrative, which is as much due process of law as is judicial process. WEIMER v. BUNBURY, 1874 30 MICH. 201.

The third respondents, however, as an administrative agency of the federal government charged with the responsibility of administering fair housing has investigatory powers relating to securing information which could be a basis of their findings. Consequently, the third respondents in this instant case are duty bound to acquire all the information and facts relating to the basis of the appellants' opposition to the construction of the SPINNEY HILL project before they can reach any meaningful and constructive conclusion as to the merits of the appellants' contention. Instead, the officials of the third respondents (HUD) who were charged with the duty of making the necessary investigation only spent half an hour with the representatives of the appellants' and the appellants' attorney in the attorney's office. How such report can be the basis in which conclusion of fact can be drawn is

something which this writer finds it difficult to accept. Due process implies an opportunity to be heard in an administrative proceeding before any decision or conclusion can be reached. It cannot be asserted by the third respondents that the half an hour interview they had with the appellants satisfied the requirement of due process of law. The conclusion, however, must be reached that the third respondents' investigatory report which was the basis of the Trial Justice's decision was really compiled without any opportunity to the appellants to be heard and therefore, appellants were not accorded due process of law.

The question of approving the SPINNEY HILL project by third respondents (HUD) has both substantive and procedure aspects. From a substantive standpoint, if any reasons or findings of fact are prerequisite to the making of a determination, the investigation must be had and the findings made or the determination would be declared invalid. From the procedural standpoint, there is the question whether, admitting the necessity for making findings of fact, it is necessary that the ag ncy make an express recital of the facts found in order for the determin-

ation to be upheld. The fundamental principle appears to be that if a determination may be subjected to question, the the administrative agency should make such findings as are necessary to permit a court to sustain the determination against the objections raised. Even apart from any statutory requirement, it may be held that a determination by an administrative agency cannot be sustained, unless supported by express findings of the basic or essential, or jurisdictional facts conditioning the exercise of its power. KINGS COUNTY LIGHTING CO. v. MALTBIE, 244 A.D. 475, 280 N.Y.S. 560. The primary purpose of findings of fact is to afford a basis for intelligent judicial review on the record of a quasi judicial hearing. It, therefore, follows that all the necessary facts relating to the specific matter in issue should be brought up in the findings. In this instant case, it could be argued that the third respondents misled the Court when they intentionally left out of the investigatory report the fact that all the three (3) projects in the Town of North Hempstead are situated in a predominantly Black neighborhood. In brief, it could be asserted that the limited time granted to the appellants to explain their position, coupled

with the inconclusive investigatory report of the third respondents, deprived appellants their constitutional right under the due process clause.

It must further be observed that the Trial Justice's failure to identify the issue involved in the case brought about the limited review by the Court which also deprived the appellants due process of law. The question presented to the Court by the appellants can be simply put; does the construction of the SPINNEY HILL project that would be occupied by racial minority (Blacks) in a minority area, when already three (3) such projects have been built in minority areas,infringe the equal protection clause of the Fourteenth Amendment and the Civil Rights Acts? It is certainly for the courts, not for administrative agency, to determine whether the constitutional right of the appellants and the Civil Rights Acts have been violated. The courts of New York and several states have long recognized and approved both the constitutional aspects of the federal rule that even though supported by evidence, an administrative determination of certain fundamental facts bearing upon a constitution is not conclusive upon the

courts. See 42 AM JUR 653; PUBLIC ADMINISTRATIVE LAW, SECTION 219. Accordingly, the trial court in this instant case ought to have exercised its own independent judgment as to the matters of constitution as required by due process of law. Where constitutional rights of the appellants are involved, due process requires independent judicial determination of the constitutional question in the trial. STATEN ISLAND CORP. v. MALTBIE, 73 N.E. 2d 705, 8 ALR 2d 825, reh. den. 75 N.E. 2d 628.

In this respect, it is submitted that the appellants were not accorded due process of law based upon the limited review of the Court, and, therefore, the decision dismissing appellants' complaint should be reversed.

ARGUMENT

POINT THREE

THE RESPONDENTS' DETERMINATION THAT THE SPINNEY HILL AREA IS A BLIGHTED AND UNSANITARY AREA CAN NOT BE ACCEPTED AS A CONCLUSION OF FACT SINCE THERE WAS NO EVIDENCE TO SUBSTANTIATE THAT CONTENTION

It is well established by decided cases that an administrative agency, in respect to determination subject to judicial review, must make findings which are sufficient to inform the court and parties as to the findings made and the basis of the findings, in order that the court and the parties may know what findings were made, whether the facts found are legally sufficient to support the determination and whether the findings are supported by the evidence. MC CALL CORP v. GEROSA, 2 AD 2d 358, 156 N.Y.S. 2d 111. The primary purpose of findings of fact is to afford a basis for intelligent judicial review on the record of a quasi-judicial hearing and it has been said that the requirement will be imposed wherever such judicial review may be invoked. SCUDDER v. O'CONNELL, 100 N.E. 2d 127. The New York courts have repeatedly pointed out the necessity for administrative

bodies to make findings of fact necessary for a court to review their determination and where the necessary findings are not supported by facts, the determination would be annulled by the court. The courts have laid it down that such determination should not contain statements regarded as conclusions and not findings of fact. SLATER v. TOOHILL, 274 A.D. 944.

As a general proposition, however, it may be stated that the requirement of express findings of fact is not satisfied by statements which describe the material facts solely in the conclusory terms and that more specific facts must be found by an administrative agency in support of its determination. NEW YORK WATER SERVICE CORP. v. WATER P. & C. COM., 27 N.E. 2d 221. Mere general conclusions without statements of the factual consideration which led to the conclusions are not findings of fact. It was held that determination that charges have "in the main" been established, is meaningless and wholly fails to advise what charges have been established and sustained. CARROLL v. HUCKLE, 274 A.D. 1024.

In the instant case, the court accepted as a conclusion of fact the determination of the respondents that

"the SPINNEY HILL area is a substandard and unsanitary area appropriate for urban renewal, and has designed the project to replace existing structures, 80% of which the Town Board has determined to be 'blighted.'" (See Page 3 of the Order of JUSTICE BARTELS.)

It must be noted that there was no evidence in the so-called investigatory report supporting the said contention. The contention lacks enough facts to support it. The mere general conclusion that the SPINNEY HILL area is "blighted and unsanitary" without statements of factual consideration which led to the conclusion are not findings of fact. BARRY v. O'CONNELL, 100 N.E. 2d 127.

The conclusion must therefore be reached that the determination of the respondents that the SPINNEY HILL area is blighted and unsanitary which is not supported by evidence is an abuse of discretion and may constitute a violation of due process of law. RE RUMSEY MFS. CORP., 71 N.E. 2d, 426, 174 ALR. 401, dissenting opinion. Consequently, it was an error for the Trial Justice to have accepted that determination by the respondents as a conclusion of fact when that determination lacked a factual basis.

Now, assuming without conceding that the determination of the respondents that SPINNEY HILL area is "blighted and unsanitary" is valid, that determination cannot in any way justify the violation of the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Acts. It must be pointed out that the Trial Justice conceded that the choice of a site location which resulted in a undue concentration of persons of a given race of socio-economic group in a given neighborhood could cause racial discrimination without any intent to discriminate, and further suggested that absence of discrimination might not be sufficient since po itive integration was the objective. The Court cited GAUTREAUX (Supra) for the aid contention (see page 17 of the Judgment of HON. J. R. BARTELS.) However, the Court further agreed with the concession in GAUTREAUX (Supra) that "there will be instances where a pressing case may be made for the rebuilding of a racial ghetto." (See page 17 and 18 of Judgment of HON. J. R. BARTELS.)

However, the question we are presented at this point is whether the necessity to rehabilitate an alleged blighted

neighborhood is an advantage which outweighs the disadvantages of racial concentration. It must be pointed out in positive terms, that when a plaintiff, as in this instant case, demonstrates that the local URBAN RENEWAL AGENCY has deliberately sought to place projects that will be occupied by racial minorities in a minority area, discrimination in violation of the constitution has been shown. The respondents can offer no countervailing interest sufficient to justify the intentional discrimination. In all the cases, there has been only one decided case, KOREMATSU v. UNITED STATES, 323 U.S. 214 (1944) in which the interest of the state was accepted as sufficient to justify discrimination on a basis of race; the overriding state interest in that case was national security in time of war. See CROW v. BROWN, 332 F SUPP. 382, 392 (N.D. GA. 1971); KENNEDY PARK HOMES ASS'N v. CITY OF LACKAWANNA, 318 F SUPP 667, 695-696 (W.D.N.Y. 1970.) There has never been any decided case in which an allegation that an area is "blighted and unsanitary" has been accepted as a justification in violating the equal protection clause of the

Fourteenth Amendment and the Civil Rights Acts.

In view of the foregoing, however, it is the contention of the appellants that the trial court erred in accepting without any proof the determination of the respondents that the SPINNEY HILL neighborhood is blighted and unsanitary. Furthermore, it is also an error for the court to conclude that the necessity of rehabilitating blighted area outweighs the disadvantages of violating the Constitution and the Civil Rights Acts.

CONCLUSION

There is no doubt that the proposed construction of the said SPINNEY HILL project would in effect perpetuate racial segregation among Black people in view of the fact that all the three (3) public housing projects are situated in predominantly Black neighborhoods. It must, however, be emphasized that respondents unsupported allegation that the area is unsanitary and blighted is not a compelling reason to justify the violation of the Constitution and the Civil Rights Acts. The violation of the Constitution and the Civil Rights Acts, coupled with the denial of due process to the appellants, is enough justication for the decision of the lower court to be overturned.

In view of the foregoing facts, appellants respectfully request that the decision of the lower court dismissing appellants' complaint would be reversed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NASSAU) SS:

ELLEN SPARROW, being duly sworn, deposes and says that deponent is over the age of 18 years, is not a party to the action and resides at Baldwin, New York. That on the 27th day of September, 1974, the deponent served the within Appellant's Brief upon Richard J. Osterndorf, Town Attorney, Town Hall, Manhasset, NY, Ressa & Nappi, 33 Main Street, Port Washington, NY and the United States Attorney, 225 Cadman Plaza East, Brooklyn, NY, the within action at the address designated by said attorney by depositing the same in a postpaid wrapper in an official depository of the United States Post Office in the State of New York.

Ellen Sparrow

Sworn to before me this 27th
day of September, 1974.

ROBERT RIVERS
NOTARY PUBLIC, State of New York
No. 30-7295477
Qualified in Nassau County
Commission Expires March 30, 19 75